(2)

No. 90-744

In the Supreme Court of the United States

OCTOBER TERM, 1990

OMAR I. GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the district court properly found that petitioner was not entitled to a reduction in his offense level as a minor participant under Section 3B1.2(b) of the Sentencing Guidelines.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-744

OMAR I. GONZALEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-9a) was entered on June 21, 1990. A rehearing petition was denied on September 6, 1990 (Pet. App. 10a). The petition for a writ of certiorari was filed on November 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner pleaded guilty in the United States District Court for the District of New Mexico to one count of possessing more than 100 kilograms of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).* He was sentenced to 87 months' imprisonment, to be followed by a four-year term of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. On November 11, 1988, a United States Border Patrol agent and a local deputy sheriff were notified that a sensor alert had been activated along the border between the United States and Mexico, about 20 miles south of Hachita, New Mexico. The two officers drove to the sensor alert area, where they saw two vehicles driving away from the area. Pet. App. 2a.

The lead vehicle was a pickup truck without license plates; the one behind it was a pickup truck with Texas license plates, topped with a camper shell. When the officers turned on the lights of their Border Patrol vehicle, the lead truck came to an abrupt stop, causing the truck behind it to stop suddenly as well. The second pickup then pulled around the first truck and proceeded down the highway. The deputy sheriff stayed with the first truck while the Border Patrol agent pursued the second truck. After the agent had pursued the second truck for about four miles, the truck swerved off the highway and traveled across country for another mile before stopping. When the

---

* Petitioner was also indicted on one count of importing more than 100 kilograms of marijuana into the United States, in violation of 21 U.S.C. 952(a). That charge was dismissed after petitioner pleaded guilty to the possession count.

agent reached the truck, he found that the driver had abandoned the vehicle. As the agent circled the truck, looking for the driver, a man jumped out of some nearby brush and fled. The agent apprehended the man, who was later identified as petitioner. Pet. App. 2a-3a.

The agent opened the camper of the truck and saw packages of marijuana. He then locked the camper and returned with petitioner to the first vehicle, where he learned that the driver of the first truck had escaped. The officers then returned to the first truck and conducted a field test that confirmed that the substance in the camper was marijuana. The net weight of the 31 packages of marijuana was approximately 662 pounds, or 301 kilograms. Pet. App. 3a.

Petitioner admitted his involvement in the offense. Petitioner claimed that he was hired to drive the truck containing marijuana across the Mexican border. He said, however, that he was not in charge of the smuggling operation and was acting under the supervision of others. He said he was to have been paid about $5,000 for his services in the smuggling operation. Pet. App. 3a.

2. The presentence report calculated petitioner's offense level as 24, and his criminal history category as IV, which established a Sentencing Guideline range of 77 to 96 months. The presentence report noted the provision in the Guidelines under which a defendant may receive a two-point reduction in the offense level if he is a "minor participant" in the criminal activity (Sentencing Guidelines § 3B1.2(b)). The report concluded, however, that "[t]he offense conduct in the instant case provides no indication that [petitioner] meets the criteria for the two level reduction." Pet. App. 4a.

Petitioner's counsel filed objections to that conclusion, arguing that petitioner should be considered a minor participant because he was a mere driver, he was being directed by another man in the lead vehicle, and the supervisor of the entire operation was a third person. Pet. App. 4a. At the sentencing hearing, counsel renewed that argument, to which the district court replied, "Mere driver of a truck bringing in 300 kilos? * * * To me, that's not a minor participant." *Id.* at 5a. After counsel for petitioner completed his argument, the court gave petitioner an opportunity to speak. Petitioner asked the court for leniency and expressed remorse for his conduct. *Ibid.* The court then found that there was no need for an evidentiary hearing because there were no disputed facts. Sentencing Tr. 7. The court imposed a sentence of 87 months' imprisonment, in the middle of the Guidelines range, and four years' supervised release. Pet. App. 5a.

3. On appeal, petitioner argued that the district court erred in finding that he was not a minor participant and in failing to hold an evidentiary hearing on that issue. The court of appeals rejected those arguments. The court of appeals determined that petitioner bore the burden of establishing by a preponderance of evidence that he was a minor participant and that petitioner had not met that burden. Pet. App. 6a-7a. The court accordingly held that the district court did not commit clear error in refusing to find that petitioner was a minor participant. *Ibid.* The court further held that the district court had afforded petitioner ample opportunity to provide information regarding his role in the criminal activity, but that petitioner had failed to take full advantage of that opportunity. *Id.* at 6a-9a.

ARGUMENT

Petitioner renews his contention (Pet. 9-16) that the district court erred in finding that he was not entitled to treatment as a minor participant under the Sentencing Guidelines. The court of appeals correctly rejected that contention.

Petitioner asserts (Pet. 11) that the district court refused to find that he was a minor participant based on the judge's "personal position that there can be no minor role in consideration of say a three hundred (300) kilogram case." Petitioner argues that such an automatic, individualized sentencing rule conflicts with the purpose of the Sentencing Guidelines to foster uniformity.

Contrary to petitioner's contention, the district judge did not fashion a rigid sentencing rule of his own that conflicted with the approach dictated by the Guidelines. While the court responded to petitioner's claim that he was a "mere driver" by remarking that petitioner's conduct did not seem to qualify as minor participation, the court never said that the amount of marijuana petitioner was carrying categorically barred a finding of minor participation. Instead, as the court of appeals determined, the district court's refusal to find that petitioner was a minor participant was based on the absence of evidence to support such a finding:

> The Presentence Report set forth in detail the relevant, uncontested facts surrounding Gonzales' arrest, including, but not limited to: Gonzales' driving a pickup truck from Mexico into the United States with 662 pounds of marijuana; Gonzales' attempt to flee from the Border Patrol; Gonzales' abandonment of the pickup, and his subsequent capture and arrest. Gon-

> zales did not object to or contradict any of the facts set forth in the Presentence Report. Nor did Gonzales establish via credible evidence why he should be considered a minor participant, i.e., "a participant who is less culpable than most other participants." U.S.S.G. § 3B1.2.

Pet. App. 7a. The court of appeals recognized that petitioner's challenge was, at bottom, an "object[ion] to the district court's interpretation of the relevant, uncontested facts." *Ibid.* The court of appeals properly rejected this challenge under the "clearly erroneous" standard of review. 18 U.S.C. 3742(d); *United States* v. *Williams*, 890 F.2d 102, 104 (8th Cir. 1989); *United States* v. *Buenrostro*, 868 F.2d 135, 136-137 (5th Cir. 1989), cert. denied, 110 S. Ct. 1957 (1990).

Far from adopting a categorical rule, the district court made precisely the type of fact-specific finding that is contemplated under the Guidelines. Sentencing Guidelines § 3B1.2, Background ("The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case."). It was surely relevant to this finding that when arrested petitioner was in control of more than 300 kilograms of marijuana; this fact at the very least cast significant doubt on petitioner's characterization of his role as that of a tangential and uninitiated pawn. Indeed, the Commentary to Guidelines § 3B1.2 suggests that in determining whether to apply that Guideline the court may consider the amount of illegal drugs with which a defendant is involved. Guidelines § 3B1.2, Application Note 2 (citing as examples of "minimal participants" for purposes of § 3B1.2(a) "someone who played no other role in a very large drug smuggling operation than to

offload part of a single marihuana shipment, or in a case where an individual was recruited as a courier for a single smuggling transaction involving a small amount of drugs").

The conclusion by the courts below that petitioner was not a "minor participant" accords with that reached by other courts on similar facts. In *United States* v. *Velasquez*, 890 F.2d 717, 720 (5th Cir. 1989), the court upheld a district court's refusal to apply Guidelines § 3B1.2 in sentencing a defendant who was found "waiting with another person late at night on the international border to receive a thirty-pound load of marijuana." Velasquez, like petitioner in this case, challenged the district court's failure to apply the Guideline on the ground that "he was merely acting as a driver of the vehicle" that was to carry the marijuana. *Ibid.* The court of appeals dismissed that argument, observing that "a court need not accept the defendant's self-serving account of his role in the drug organization." *Ibid.* (internal quotation marks omitted).

In *United States* v. *Williams*, 890 F.2d 102, 104 (8th Cir. 1989), the court of appeals upheld the lower court's refusal to accord "minor participant" status to a one-time courier who claimed to be unaware of the amount of illegal drugs he was carrying. The court of appeals noted that there was evidence that others were paying Williams to carry the drugs but concluded that neither that fact nor any other evidence "established that Williams was any less culpable than those unidentified actors whose actual roles were unknown." *Id.* at 104. The court of appeals also noted that Williams' receipt of $2000 for a single trip cast doubt on his assertion that he was unaware of the amount of drugs he was carry-

ing. *Ibid.* See also *United States* v. *Gordon*, 895 F.2d 932, 934-936 (4th Cir. 1990) (reversing and remanding a finding that defendant was "minor participant" that was based solely on defendant's role as a courier).

In *United States* v. *Buenrostro, supra*, the court of appeals upheld the district court's refusal to classify the defendant as a "minimal participant" under Sentencing Guidelines § 3B1.2(a). 868 F.2d at 137-138. In terms fully applicable here, the court of appeals rejected the notion that one-time couriers should normally be entitled to a reduction under that Guideline:

> [C]ouriers are an indispensable part of drug dealing networks. Without somebody to take the drugs across the border, the drugs will never reach their illicit market. In addition, the mere fact that a defendant was apprehended while acting as a courier does not imply that the defendant is *only* a courier. The district judge need not accept the defendant's self-serving account of his role in the drug organization. Finally, even if the defendant were purely a courier having no knowledge of other aspects of the drug-dealing operation, the defendant might nonetheless be a highly culpable participant * * *. A courier who willingly undertakes illegal transit without asking many questions is especially valuable to a criminal organization.

868 F.2d at 138.

As in the cases discussed above, the challenge in this case is premised on the notion that a self-described one-time courier of illegal drugs is automatically entitled to a reduction in the offense level as a "minor participant" under Guidelines § 3B1.2. The district

court's determination that petitioner was not entitled to such a reduction was a fact-specific finding made after petitioner was afforded ample opportunity to show that he was entitled to a reduction and failed to do so. That finding was not clearly erroneous and therefore was properly upheld by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

JANUARY 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 282061 20284